United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7433

United States Court of Appeals
FOR THE SECOND CIRCUIT

ELI RAITPORT,
Plaintiff-Appellant,

v.

COMMERCIAL BANKS LOCATED WITHIN THIS DISTRICT AS A CLASS, FOUNDATIONS OPERATING INVESTMENT PORTFOLIOS AND MANAGED DIRECTLY OR INDIRECTLY BY ABOVE SAID BANKS AS A CLASS,
Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE, FIRST NATIONAL CITY BANK

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Preliminary Statement

This is an appeal from the decision and order of the United States District Court, Southern District of New York (Hon. Henry F. Werker, J.), dated March 31, 1975, granting summary judgment in favor of First National City Bank ("Citibank")[1] upon the ground of collateral

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[1] Citibank was served as a purported representative of an alleged class of defendants comprising commercial banks in this district, and foundations operating investment portfolios and managed directly or indirectly by the commerical banks. There has been no finding, nor any application therefor, that any such class exists or that Citibank is its representative.

estoppel. Plaintiff-appellant Eli Raitport ("Raitport") moved for reconsideration of the order granting summary judgment, and by order dated May 27, that motion was denied. Upon that denial, Raitport appealed.

Statement of Facts

Raitport commenced this action, *pro se,* in the district court, by a complaint filed on January 8, 1975 and by an amendment thereto filed on January 30, 1975 (A2-A16),[2] claiming that Citibank, as an alleged representative of a class of un-named financial institutions, conspired to refuse to deal with plaintiff and conspired to monopolize the commercial lending industry in violation of 15 U.S.C. §§ 1, 2 and 13 (the "Sherman Act"). Raitport claims two billion dollars damages, trebled. Prior to the commencement of this action, Raitport brought an action in this same district against, among others, Citibank's wholly-owned subsidiary, FNCB Capital Corp. In the earlier action, Raitport claimed that FNCB Capital Corp. and various other lending institutions conspired to refuse to deal with him and conspired to deny financing for his various plans. While Raitport, there, raised issues additional to the ones in the present action, all of the issues raised in the present action were raised and decided in the previous action. A copy of Raitport's complaint in the previous action appears in the Appendix (A 21-A 25). On January 9, 1975, summary judgment was entered in that action against Raitport and in favor of all the defendants. In granting summary judgment to the defendants, Judge Knapp held that there was no evidence to support any of Raitport's claims, and particularly, that there was no evidence to support his claim that the defendants

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[2] Numbers in parentheses refer to pages of an Appendix Citibank will seek leave to file for the convenience of the Court. Counsel for Citibank have not received any appendix from Raitport, nor does Raitport's brief make any reference to an appendix.

conspired to violate any of the provisions of the Sherman Act:

> "He [plaintiff Eli Raitport] has conducted extensive discovery, under the supervision of Magistrate Schreiber, but can point to no documentary evidence of any agreement among the defendants to monopolize certain industries in restraint of trade. Nor does he suggest the availability of any testimony, other than his own above-described speculations, which would support his allegations . . ." *Raitport* v. *Chase Manhattan Capital Corp.*, 388 F.Supp. 1095, 1100, (S.D.N.Y. 1974), *appeal dismissed,* 75-811 (2nd Cir. 1975) (A 38).

In this action, Raitport sought to renew his claim that he has been conspired against in violation of the Sherman Act, and, this time, he proceeds against Citibank, rather than Citibank's subsidiary, as defendant. The court below dismissed this action holding that since Raitport had lost his action against Citibank's subsidiary, he is barred from maintaining this action against Citibank by operation of the doctrine of collateral estoppel:

> "What plaintiff has done in this action is simply to 'switch adversaries' from the subsidiary credit corporations in a prior action to the parent of one of those corporations as a representative of all banks in this district and foundations with portfolios arranged by those banks [citation omitted]. The whole thrust of this action is the same as the prior action—one huge conspiracy to prevent plaintiff from manufacturing his inventions.
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> * * *
>
> Plaintiff, no stranger to the federal courts [citations omitted] had a full and fair opportunity to litigate the same claims in his prior suit. He cannot avoid the results of that suit by merely suing the parent

banks and embellishing on his theories." *Raitport* v. *Commercial Banks*, 391 F.Supp. 584, 587 (S.D.N.Y. 1975) (A 32).

Questions Presented[3]

May Eli Raitport re-litigate against Citibank his claim that he is a victim of Sherman Act conspiracies, when that claim has been finally adjudicated against him in a prior action, based on the same claim, against Citibank's wholly owned subsidiary? Was the district court correct in dismissing this action on the ground of collateral estoppel?

Summary of Argument

The district court properly held that Raitport is barred from maintaining this action against Citibank upon the ground of collateral estoppel. Raitport previously, and unsuccessfully, brought an action against Citibank's wholly-owned subsidiary FNCB Capital Corp., proclaiming the existence of a conspiracy to refuse to deal with Raitport in violation of the Sherman Act. The district court awarded summary judgment to Citibank's subsidiary, stating that Raitport had not, despite extensive discovery, produced or offered any evidence to support the claim that there was a conspiracy to refuse to deal with, and withhold credit from, Raitport in violation of the Sherman Act. In the present action against Citibank, Raitport again claims that he has been conspired against, and this time he names Citibank, rather than Citibank's subsidiary, as a party defendant. In commencing this action against

[3] Citibank does not accept Raitport's statement of the issues, and therefore, in accordance with Rule 28(b) of the Federal Rules of Appellate Procedure, Citibank presents these questions, which it urges are the only ones to be resolved by this appeal.

Citibank, Raitport merely substituted the parent corporation and sought to prosecute the same claim that was unsuccessfully made against Citibank's subsidiary.

It is well settled that one cannot, simply by switching adversaries, re-litigate identical claims to those adversely adjudicated against the claimant in a previous action. The district court was correct in holding that Raitport is barred from maintaining this action against Citibank, since Raitport had a full and fair hearing of the claim here involved in his prior action against Citibank's subsidiary. That action was determined finally and adversely against Raitport. Accordingly, the judgment of the court below should be affirmed.

I

All of the claims made by Eli Raitport in the present action have been adjudicated against him in a previous action brought against Citibank's subsidiary.

In the prior action against Citibank's wholly-owned subsidiary, Raitport alleged that, in declining to finance Raitport's business ventures, Citibank's subsidiary, and others, violated various Federal statutes* including the Sherman Act. *Raitport* v. *Chase Manhattan Capital Corp.*, 388 F.Supp. 1095, 1097 (1975) (A 37). Judge Knapp held that the complaint failed to state a claim upon which relief could be granted as to Raitport's alleged claims under (a) the Small Business Act, (b) the Small Business Investment Act, (c) the Economic Stabilization Act, and (d) the Civil Rights Act. As to the only remaining claim in that action, the alleged Sherman Act violations, Judge Knapp granted summary judgment to all defendants, in-

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* (a) The Small Business Act, 15 U.S.C. § 631 *et seq.*, (b) the Small Business Investment Act, 15 U.S.C. § 681 *et seq.*, (c) the Economic Stabilization Act, 12 U.S.C. § 1904 *et seq.*, (d) the Civil Rights Act, 42 U.S.C. § 1985 and (e) the Sherman Act, 15 U.S.C. § 1 *et seq.*

cluding Citibank's subsidiary, because Raitport, after extensive discovery, failed to produce evidence to support his allegations:

> "Despite the plaintiff's failure to state a claim upon which relief may be granted under the Small Business Act, the Small Business Investment Act, the Economic Stabilization Act or the Civil Rights Act of 1861, we find that the complaint does state a cause of action under the Sherman Anti-Trust Act, 15 U.S.C. § 1 et seq. Were the plaintiff able to show by competent evidence that the defendants were, in fact, 'instrumental [in preventing] other financial institution [sic] from helping plaintiff', for the purpose of 'restrain-[ing] plaintiff from entering [the] trade of his choice', and that the defendants were 'engaged in an unscrupulous conspiracy to . . . monopolize certain industries . . . to preclude establishment of new firms in [the] automotive, . . . appliance . . . and energy producing or energy conservative fields', he would be entitled to relief under 15 U.S.C. § 15.
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> "However, the only 'evidence' the plaintiff proffers could by no stretch of the imagination meet his burden of proof under the statute. His entire case rests on the assumption that his inventions are so economically promising that the only explanation for the defendants' refusal to finance them must be the existence of an 'unscrupulous' conspiracy. The plaintiff offers no expert testimony as to the worth and feasibility of his invention, but relies instead upon his own, inevitably self-serving, opinion." 388 F. Supp. at 1099 (A 37 A 38).

Raitport commenced the present action claiming again that the defendants violated the Sherman Act. According to his present complaint:

> "(a) Federal question stands in alleged violation of Anti-Trust laws and private action is permitted; 15 USC 16.

(1) Plaintiff alleges that defendants have unlawfully refused to deal with him and restrained him from continuing and entering business as set forth below in violation of 15 USC 2;

(2) Plaintiff alleges that defendants have conspired to refuse to deal with him in violation of 15 USC 1 & 2.

(3) Plaintiff alleges that defendants have conspired to destroy investment banking industry for the goal of monopolizing the commercial banking industry in violation of 15 USC 1 & 2.

(4) Plaintiff alleges that defendants conspired on behalf of automotive, appliances, energy producing and food producing industries to monopolize in violation of 15 USC 1 & 2.

(5) Plaintiff alleges that defendants discriminate without justification against new manufacturing businesses in violation of 15 USC 13.

(6) Plaintiff alleges that defendants discriminate without justification against small manufacturing companies competing or attempting to compete against energy producing, automotive, appliances, and container industries in violation of 15 USC 13."

Raitport v. *Commercial Banks,* 391 F.Supp. 584, 585 (S.D.N.Y. 1975). (A27-A28).

These allegations are precisely the same as the Sherman Act violations alleged in Raitport's previous action. As the Court below stated:

> "As discussed *supra* the only possible theory of recovery alleged in the prior suit was the antitrust claim of an 'unscrupulous conspiracy' to monopolize certain industries and refusals to finance the plaintiff's businesses. *These very same allegations, form the basis for plaintiff's complaint in this action."* 391 F.Supp. at 587 (A 31) (emphasis added).

All Raitport has done in the maintenance of this action is to switch adversaries, from Citibank's subsidiary to Citibank, and present the same claims once again.

II

Even though not a party to the previous action brought by Raitport, Citibank is entitled to assert the judgment granted therein as a bar to this action.

Where, as in the present case, a plaintiff, after losing a previous action on certain claims, commences a second action raising the same claims against a different defendant, the defendant in the second action is entitled to assert as a bar to the second action, the judgment awarded in the first action. The doctrine of collateral estoppel by judgment rests on the principle that the party against whom a previous judgment is asserted has had an opportunity to litigate the merits of his claim or defense and that such an opportunity is all to which that party is entitled. As one court has said in awarding summary judgment in favor of one not a party to a previous action, *res judicata* applies where:

> "*. . . the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it.*" *United States* v. *United Airlines, Inc.*, 216 F.Supp. 709 at 726 (E.D. Wash. Nov. 1962) *aff'd sub nom. United Air Lines* v. *Weiner*, 335 F. 2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

Formerly, courts restricted the application of previous judgments to cases where a party in action number one, after losing on the merits to a party defendant, sought to raise the same claim in a second action against the same

defendant, or one in "privity" with that defendant. This "privity" or "mutuality" requirement is no longer operative and a previous judgment may be asserted defensively by a different, even an unrelated, defendant in a second action brought by a plaintiff, where the same plaintiff has already raised the same issues against a different defendant in a previous action and those issues were resolved against the plaintiff on the merits.

In a decision that has been characterized as the most thorough and clearly reasoned explanation of the abandonment of the requirement of mutuality,[4] Justice Traynor of the Supreme Court of California stated:

> "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.
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> * * *
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> The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching parties." *Bernhard* v. *Bank of America,* 19 Cal.2d 807, 122 P.2d 892, 894, 5 (1942).

This Court, citing Justice Traynor's opinion with approval, has itself recognized the abandonment of the doctrine of mutuality where the same plaintiff, unsuccessful in action number one, switches adversaries and attempts to relitigate the same discredited claims against a different defendant in a second action:

> "This doctrine of the need for mutuality of estoppels, criticized by Bentham over a century ago as

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[4] *See Zdanok* v. *Glidden Co.*, 327 F.2d 944 (2nd Cir. 1964); *United States* v. *United Air Lines, Inc.*, 216 F.Supp. 709 (D. Nevada 1962); "Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine", 9 Stanford L. Rev. 281.

> destitute of any semblance of reason . . . has been much eroded in recent years.
>
> * * *
>
> We see no purpose in multiplying citations since it is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in *Bernhard* v. *Bank of America* . . ." *Zdanok* v. *Glidden* Co., 327 F. 2d 944, 954 (2d Cir. 1964).

The court below properly applied the doctrine of collateral estoppel as barring Raitport in this action. The essence of the decisions quoted above is that it is a waste of the time and resources of both the court and the parties to allow a plaintiff multiple opportunities to litigate the same claim. The application of collateral estoppel results in no unfairness to Raitport as he has had his day in court. Judge Knapp allowed plaintiff ". . . extensive discovery under the supervision of Magistrate Schreiber . . ." 388 F.Supp. at 1100 (A 38). Raitport's claims were thereafter resolved against him. Raitport enjoyed, as Judge Werker said, ". . . a full and fair opportunity to litigate the same claims in his prior suit." 391 F.Supp. at 587 (A 32).

Moreover, it is highly appropriate to apply the doctrine of collateral estoppel, with its concern for eliminating wasteful and repetitious litigation, to this particular plaintiff. The present case is but another item in a torrent of litigation he has undertaken in the federal courts.[5] How-

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[5] E.g., *Raitport* v. *General Electric Co.*, 74 Civ. 2123 (S.D.N.Y. 1975);
Raitport v. *Chase Manhattan Capitol Corp.*, 388 F.Supp. 1095 (S.D.N.Y. 1975);
Raitport v. *National Bureau of Standards*, 378 F.Supp. 380 (E.D. Pa. 1974);
Raitport v. *Small Business Administration*, 380 F.Supp. 1059 (E.D. Pa. 1974);
Raitport v. *General Motors Corporation*, 366 F.Supp. 328 (E.D. Pa. 1974).

ever gratifying it may be for Raitport to have initiated this litigation, there must be an end to his habitual renewal of adversely adjudicated claims.

III

The decision of the Court below should be affirmed.

Dated: New York, New York,
September 26, 1975.

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Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

THOMAS D'ESPOSITO being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of September, 1975, he served two copies of the Brief of Defendant-Appellee First National City Bank on

Eli Raitport, Appellant, pro se

the attorney for the

by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said appellant at No. 1807 Mower Street, Philadelphia, Pa. ( ), that being the address designated by him for that purpose upon the preceding papers in this action.

Thomas D'Esposito

Sworn to before me this
26th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976